

**UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451**

MBA

Mailed: July 28, 2010

Cancellation No. 92050296

Altadis U.S.A. Inc.

v.

Wentworth E. Miller

**Before Bucher, Zervas and Bergsman, Administrative Trademark  
Judges**

**By the Board:**

On March 9, 2010, the Board issued an order granting petitioner's motion for summary judgment on its claim of priority and likelihood of confusion and denying respondent's cross-motion for summary judgment on the same claim (the "Prior Order"). This case now comes up for consideration of respondent's combined motion, filed April 9, 2010, for reconsideration of the Prior Order and to amend the identification of goods in its involved Registration No. 3233835 for the mark CIGARETTESAVER (the "Registration").<sup>1</sup> Petitioner opposes the motion.

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<sup>1</sup> Issued April 24, 2007 from an application filed March 3, 2003, based on a date of first use in commerce of November 2003 for "cylindrical tube with removable caps at one or both ends for enclosing and extinguishing by oxygen deprivation a lighted cigarette, cigar, or similar smokable product."

In the Prior Order, the Board found that there is no genuine issue of material fact that petitioner has standing and priority of use. The Board further found that despite respondent's alleged attempt in 2003 to amend his identification of goods to, among other things, exclude the word "cigar," the Office did not recognize the purported amendment and respondent never requested that the identification of goods in the Registration be changed after the application was published for opposition or the Registration issued.<sup>2</sup> Therefore, under the Prior Order, "we consider the identification of goods to be that set forth" in the Registration. Prior Order at 7. Based on that identification of goods, the Board found that there is no genuine issue of material fact that the parties' goods "are legally identical, at least in part," and that "the channels of trade and classes of consumers are similar or identical." Id. at 8. It further found that because "the parties' goods are available to the general public, the standard of care for purchasing the goods is that of the least sophisticated purchaser." Id. Finally, the Board found that "the meaning and commercial impression of the [parties'] marks are

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<sup>2</sup> The alleged "amendment" is included in respondent's November 25, 2003 office action response in connection with the application which matured into the Registration. In the response, respondent never specifically requested entry of the proposed amendment. Rather, respondent recited the proposed amended identification of goods only in the substitute drawing page submitted with the office action response.

similar," and, accordingly, "there are no genuine issues of material fact with respect to priority and likelihood of confusion," and the "parties marks are likely to cause confusion." Id.

In his motion, respondent first seeks to amend the identification of goods in the Registration, claiming that his November 25, 2003 Office action response was a "de novo and distinct application." Respondent argues that it would be "a manifest injustice that a misdescription of goods traceable to an error or oversight of the USPTO should result in cancellation of a trademark duly applied for and granted."

Respondent's motion to amend the identification of goods in the Registration is hereby **DENIED**. Even if the drawing page submitted with the November 25, 2003 Office action response were a proper request to amend, and it was not, the fact remains that the Registration issued with an identification including the word "cigar," and respondent never sought to correct the identification. It is now too late to do so, given that respondent's request to amend was only made in response to petitioner's motion for summary judgment and petitioner does not consent to the proposed amendment. See, Trademark Rule 2.133(a).<sup>3</sup>

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<sup>3</sup> Respondent's Office action response was not a new application, which would have required additional information not submitted with the Office action response, and a filing fee.

Respondent next claims that the Prior Order contains "clear errors of fact and law." First, respondent argues that the Board erred in holding that petitioner's mark "is a double entendre which conveys to consumers that the goods would be used for saving," as well as "savoring," a cigar. Id. at 12. Second, respondent argues that the Board erred in not taking judicial notice "that 'OR' in 'SAVOR' and 'ER' in 'SAVER' do not have the same sound, and that CIGAR and CIGARETTE are different words with different meanings." Third, respondent claims that the Board erred in not considering all of the likelihood of confusion factors set forth in In re E. I. du Pont De Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Fourth, respondent alleges that it was error for the Board to not find petitioner's mark weak. Fifth, "the Board further committed error of law in apparently applying a standard of 'least sophisticated purchaser' in assessing likelihood of confusion." Finally, respondent argues that the Board erred in finding that the parties' "marks both consist of a combination of two words." Prior Order at 11.

A motion for reconsideration "may not properly be used to introduce additional evidence, nor should it be devoted simply to a reargument of the points presented in a brief on the original motion." TBMP § 518 (2d ed. rev. 2004). Instead, a motion for reconsideration "should be limited to

a demonstration that based on the facts before it and the applicable law, the Board's ruling is in error and requires appropriate change." Id. In this case, respondent's motion for reconsideration is merely a reargument of the points presented in respondent's response and cross-motion.

Furthermore, we find no error in the Prior Order. The finding that petitioner's mark is a double entendre was specifically based on dictionary definitions in evidence. Prior Order at 9, 12. Respondent's arguments regarding the differences between OR and ER and CIGAR and CIGARETTE were not appropriate for judicial notice for the reasons stated, id. at 9 n. 5, and it was not error for the Board to find similarities between the marks based on dictionary definitions, among other evidence, or to reject respondent's argument that the marks are pronounced differently. Centraz Industries, Inc. v. Spartan Chemical Co., Inc., 77 USPQ2d 1698, 1701 (TTAB 2006). As pointed out in the Prior Order, it is not necessary or appropriate to consider all du Pont factors where, as in this case, there are not probative facts in evidence bearing on all of the factors. Du Pont, 476 F.2d at 1357, 177 USPQ at 563. In fact, respondent did not introduce evidence that petitioner's mark is weak, and in any event, the Board specifically found that the first words of the parties' marks "are highly descriptive, if not generic ...," but that nevertheless "[c]onsumers would view

the source of the goods as the same due to the similarities in the marks, with one being for cigarettes and one for cigars." Prior Order at 11-12. The Prior Order properly applied the "least sophisticated consumer" standard because the parties' products are offered to the general public. Alfacell Corp. v. Anticancer Inc., 71 USPQ2d 1301, 1306 (TTAB 2004).<sup>4</sup> Finally, each of the parties' marks combine two words, with petitioner's including a space between them and respondent's combining the two words without a space. It was not error to find that respondent's use of CIGARETTE and SAVER without a space is insufficient to avoid a likelihood of confusion with CIGAR SAVOR.

For all of these reasons, respondent has not shown that the Prior Order was in error and its motion for reconsideration is accordingly **DENIED**.

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<sup>4</sup> Respondent's reliance on Hills Bros. Coffee, Inc. v. Hills Supermarkets, Inc., 428 F.2d 379, 166 USPQ 2 (2d Cir. 1970) is misplaced, both because that decision is not binding on the Board and because it does not stand for the proposition alleged by respondent.